

Mackey (Migration) [2019] AATA 6220 (24 October 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division
APPLICANT: Mr David Thomas Mackey
CASE NUMBER: 1724085
HOME AFFAIRS REFERENCE(S): BCC2016/1948072
MEMBER: Adrienne Millbank
DATE: 24 October 2019
PLACE OF DECISION: Brisbane

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl.820.211 of Schedule 2 to the Regulations
- cl.820.221 of Schedule 2 to the Regulations
- r.2.03A

Statement made on 24 October 2019 at 4:53pm

CATCHWORDS

MIGRATION – refusal – Partner (Temporary) (Class UK) visa – Subclass 820 – substantial corroborative evidence provided– genuine and continuing relationship– credible witness– decision under review remitted

LEGISLATION

Migration Act 1958, ss 5, 65

Migration Regulations 1994, rr 1.09, 2.03 Schedule 2, cls 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a Delegate of the Minister for Immigration and Border Protection on 20 September 2017 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant is a 60-year-old national of the United Kingdom. He first arrived in Australia as the holder of a Visitor (Subclass 976) visa in 2007, and was subsequently granted a Temporary Work Skilled (Subclass 457) visa and a Student (Subclass 572) visa. At the time of application he held a Temporary Work Skilled (Subclass 457) visa. The sponsor was born in Micronesia and obtained Australian citizen by grant in 2010. She is 51 years old at the time of decision. The parties claim that they met in November 2013 and have lived together as a de facto couple since April 2014.
3. The applicant applied for the visa on 4 June 2016 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The Delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2). Insufficient evidence was provided to satisfy the Delegate that the applicant was in a de facto relationship with the sponsor, and that the applicant had been in a de facto relationship with the sponsor for 12 months before the time of application.
5. The applicant appeared before the Tribunal on 16 October 2019 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor.
6. The applicant was represented in relation to the review by his registered migration agent.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in the present case is whether the parties were in a genuine de facto relationship at the time of application and decision.

Whether the parties are in a spouse or de facto relationship

9. Clause 820.211(2)(a) and cl.820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian citizen.

Are the parties in a de facto relationship?

10. 'De facto partner' is defined in 5CB of the Act, which provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and

continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).

11. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision. Each of the specific matters contained in r.1.09A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Financial aspects of the relationship

12. The parties confirmed at hearing that they have no joint ownership of significant assets such as property, and no joint liabilities beyond their joint tenancy agreement for the townhouse they live in. Evidence was provided that the sponsor is listed as 100 per cent non-lapsing binding beneficiary in the applicant's superannuation account. At hearing the applicant confirmed that he has no property or other significant assets that he personally owns, beyond his car that is used for joint purposes.
13. Evidence was provided that the parties have a joint bank account. At hearing the applicant stated that the account was opened on the advice of his migration agent, not because the parties needed it to support each other financially or to share their incomes. He stated that the joint account was now serving a useful purpose as he and the sponsor are using it for savings purposes; for travel and a wedding in Micronesia.
14. The parties described how their earnings from their employment, as a child care support worker and project scheduling officer for Air Traffic Australia, are paid into their personal bank accounts. The sponsor stated that she paid the electricity and gas bills, and for some of the food, while the applicant paid for everything else, including rent and other utility bills. They stated that the arrangement they have evolved works for them; that they are paid on alternative weeks and draw on whatever funds are available; and that they share expenses including day-to-day expenses without worrying which account the money is drawn from. They described how the sponsor sends money on a regular basis to her family in Chuuk in Micronesia.
15. At hearing the parties both displayed knowledge about each other's income and the balances in each other's and the joint bank account. The Tribunal accepts that the parties have pooled their financial resources and that they share day-to-day household expenses commensurate with a genuine de facto relationship.

Nature of the household

16. Evidence was provided of a joint tenancy lease, renewed since 22 April 2015. Copies of rental receipts from March 2018 to October 2019 were also provided, naming the parties as joint tenants and payees. At hearing the applicant confirmed that the parties have lived together in the same place, a townhouse in a gated community in a Brisbane suburb near the airport where he works, since the sponsor moved in with him in April 2014. Photos were provided of the parties together, with their dog Atticus, and hosting friends, in their townhouse.
17. In statutory declarations signed on 5 September 2019 the parties describe how they share the housework, with the applicant doing most of the cooking and household maintenance, and the sponsor doing most of the cleaning.

18. The parties have adult children from previous relationships who do not live in Brisbane. The applicant advised that one of his sons has visited from the UK, and the sponsor's son who lives in Cairns has also visited and stayed with the parties in their Brisbane townhouse.
19. The Tribunal finds that the parties have established a joint household where they have lived together as a couple.

Social aspects of the relationship

20. Photos were provided of the parties together with members of the sponsor's family in Chuuk in Micronesia in 2017; with friends at their Brisbane townhouse; and eating out. At hearing the parties showed knowledge about each other's children and grandchildren, and described plans for a family visit from the applicant's eldest son early next year.
21. In his statutory declaration signed on 5 September 2019, the applicant states that the sponsor has met many of his friends and some of his work colleagues. He advises that as a committee member of the social club at his company, he has arranged events which have provided opportunities for colleagues to meet each other's partners. He also describes how he likes to share recipes with the sponsor's close friends with whom the parties meet up once a month.
22. A statutory declaration signed on 27 September 2018 was provided by a friend and colleague of five years of the applicant. He declares that he knows the sponsor from her attendance at events, usually dinners at local establishments, organised by the social committee of which the applicant is a member.
23. A statutory declaration signed on 2 October 2018 was provided by the letting agent and onsite manager of the estate where the parties live. He declares that he has known the parties as a couple since 2014, when the sponsor came to live with the applicant as his partner and joint tenant, and that he has observed them to be a caring couple.
24. The Tribunal accepts on the evidence provided that the parties represent themselves to other people as being in a de facto relationship with each other; that in the opinion of friends and acquaintances they are a de facto couple; and that they plan and undertake joint social activities as a de facto couple.

Nature of persons' commitment to each other

25. The parties first met in November 2013 and have lived together for over five years, since April 2014.
26. Evidence was provided that the applicant purchased an engagement ring for the sponsor in 2016. In their statutory declarations signed on 5 September 2019, and at hearing, the parties describe how they intend to organise a wedding, possibly at a chapel in Turmon Bay in Guam, to which they will invite family from Micronesia and the UK.
27. At hearing the applicant described how he has developed a relationship with the sponsor's family in Micronesia, and contributed to the family household in Chuuk.
28. The photos provided to the Tribunal show the parties together as a couple and appearing happy and comfortable in each other's company. Travel documents were provided, and at hearing the parties confirmed that they have travelled together to Chuuk in Micronesia, and within Australia to Sydney, Adelaide and Stradbroke Island. Booking advice and receipts were provided showing the parties have attended shows and movies together.

29. In his statutory declaration of 5 September 2019 the applicant states that he and the sponsor are best friends and confidants and have come to rely on each other. In her statutory declaration of 5 September 2019 the sponsor states that the applicant is caring and supportive and that they both share a very dry sense of humour, which makes the relationship 'stronger and more interesting'.
30. The parties presented as a supportive couple at hearing. The sponsor has a hearing disability, and has been in receipt of a disability support pension. The applicant described how he has assisted and encouraged her to find paid employment, which she enjoys.
31. The parties were open and forthright at hearing, and the applicant was articulate and assertive. The Tribunal found them credible witnesses and accepted their testimony.
32. The Tribunal accepts that the parties have lived together as a couple for over five years; that they have provided and drawn companionship and emotional support from each other; and that they see the relationship as long-term.
33. The Tribunal finds that the parties do have a mutual commitment to shared life to the exclusion of others; that they are in a genuine and continuing relationship; and that they do live together and not separately and apart on a permanent basis.
34. The parties are not related by family.
35. On the basis of the above the Tribunal is satisfied that the requirements of s.5CB(2) are met at the time the visa application was made and the time of this decision.
36. Therefore the applicant meets cl.820.211(2)(a).
37. The parties are over 18 years of age and the sponsor is the de facto partner of the applicant. Therefore the applicant meets cl.820.211(2)(c). The applicant was the holder of a substantive visa at the time of application, therefore he meets cl.820.211(2)(d).
38. Therefore the applicant meets cl.820.211 and cl.820.221.

Are the additional criteria for a de facto relationship met?

39. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. Both members of the couple must be at least 18 years old: r.2.03A(2). In this case, at the time of application, the applicant and the sponsor were at least 18 years old.
40. The applicant must have been in the de facto relationship for at least the 12 month period ending immediately before the date of the application: r.2.03A(3). This requirement will not apply in limited circumstances, such as: where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009); where the applicant can establish compelling and compassionate circumstances for the grant of the visa; or in certain circumstances where the sponsor held, holds or is applying for a permanent humanitarian visa.
41. The applicant has provided evidence in the form of a Queensland Civil Partnership Certificate that the parties' relationship was registered on 30 March 2015 under the Queensland Civil Partnerships Act 2011 as a kind of relationship prescribed in the Acts Interpretation (Registered Relationships) Regulations 2008: r.2.03A(5). Accordingly, the 12 month requirement does not apply.

42. For these reasons the Tribunal is satisfied that the applicant meets the additional criteria prescribed in r.2.03A.
43. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

44. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
 - cl.820.211 of Schedule 2 to the Regulations
 - cl.820.221 of Schedule 2 to the Regulations
 - r.2.03A

Adrienne Millbank
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).